SUPREME COURT, U. S.

JUL 14 1972

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-1475

FRED E. WILSON, - - - - - - Petitioner

versus

MERRITT S. DEITZ, JR., Commissioner, Department of Economic Security, Division of Public Assistance, Commonwealth of Kentucky, - - - - - Respondent

On Petition For Writ of Certiorari to United States Court of Appeals For Sixth Circuit

PETITIONER'S REPLY BRIEF

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MERRITT S. DEITZ, JR., Commissioner, Department of Economic Security, Division of Public Assistance, Commonwealth of Kentucky, - - - *Respondent*

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERITORARI TO UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, referred to at page 1 of the petition for a writ of certiorari, has now been reported at 456 F. 2d 314.

PURPOSE OF THIS BRIEF

The purpose of this reply brief is to show that arguments raised in the respondent's brief are without merit, and to correct mis-statements of law and fact contained therein.

ARGUMENT

1. Respondent's Procedure is Not in Compliance With Goldberg v. Kelly

Respondent's brief (page 4) states that "At the time Wilson and his class were removed from the rolls, the Kentucky Agency had not had time to implement the new procedures required by *Goldberg.*" That is not true. *Goldberg* v. *Kelly,* 397 U. S. 254, 25 L. Ed. 2d 287, 90 S. Ct. 1011, was decided March 23, 1970. The petitioner's grant was terminated effectice July 1, 1970. Respondent did not reinstate the petitioner or any member of the class, or make retroactive payment, until compelled to do so by the order of the District Court entered December 24, 1970.

Respondent's brief (page 2) claims that the Kentucky welfare agency became in compliance with the *Goldberg* decision by restoring to the welfare rolls and paying retroactively, all persons who, having requested a pre-termination evidentiary hearing, were removed from the rolls without such a hearing. That is untrue. Compliance with the *Goldberg* requirement of a pre-termination evidentiary hearing is not contingent upon a request therefor by the welfare recipient. The statement in respondent's brief, referred to above, is an admission that numerous welfare grants have been terminated where the recipients have not expressly requested pre-termination evidentiary hearings, and that such persons have not been restored to the rolls or received retroactive payments. The respondent has continued to follow that policy, which is contrary to the

Goldberg decision and in violation of the due process provisions of the Fourteenth Amendment of the United States Constitution.

2. Class Action Aspects are Presented for Review

Respondent's brief (page 4) states that the petitioner was finally granted an evidentiary hearing upon his express request therefor, as a result of which his benefits were terminated. That is untrue. The decision of the hearing officer was in favor of the petitioner, but it was reversed by the respondent upon review by him. That case is now pending on appeal in the state court.

It should be borne in mind that this federal court case is a class action. The opinion of the United States Court of Appeals noted that "Appellant's complaints in this court, however, are with the class action aspects of this case" (see Appendix 1 to Petition for Writ of Certiorari, page 12). Numerous persons who are members of the class represented by petitioner Wilson are affected by this federal court case (see Appendix 2 to Petition for Writ of Certiorari, pages 16-18).

3. Express Objection to Termination and Request for Hearing is Not Required

Respondent's brief (page 3) states that petitioner's counsel has been unable to point out to the United States Court of Appeals or to this Court anything in the *Goldberg* case that says that "a hearing must be conducted, even though the recipient has not requested

one or objected to the termination." That is not true. Although the factual issues in the Goldberg case may not have involved the precise question, counsel for the petitioner have consistently and vigorously argued in the District Court, and in the Court of Appeals, and in this Court, that the whole tenor, import and effect of the *Goldberg* decision is to require a pre-termination evidentiary hearing before welfare benefits can be discontinued, and that failure of a welfare recipient to expressly object to termination, or to expressly request an evidentiary hearing thereon, does not constitute a consent to termination.

Respondent's brief (page 4) cites *Grannis* v. *Ordean,* 235 U. S. 385, 394, as holding that the requisite of due process of law is the opportunity to obtain a hearing. In the later case of *Mullane* v. *Central Hanover Bank and Trust Co.,* 339 U. S. 306, 70 S. Ct. 652, 94 L. Ed. 865, this Court cited and amplified the *Grannis* case as follows:

> " 'The fundamental requisite of due process of law is the opportunity to be heard.' Grannis v. Ordean, 234 U. S. 385, 394, 34 S. Ct. 779, 783, 58 L. Ed. 1363. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiese or contest."

This Court has never held that a request for a hearing is a condition precedent to the right to a hearing under the due process clause of the Fourteenth Amendment. See: *Sniadach* v. *Family Finance Corp.,* 395 U. S. 337, 343, 89 S. Ct. 1820, 1823, 23 L. Ed. 2d 349;

Goldberg v. *Kelly,* 397 U.'S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287; *Wisconsin* v. *Constantineau,* 400 U. S. 433, 27 L. Ed. 2d 515, 91 S. Ct. 507; *Bell* v. *Burson,* 402 U. S. 535, 29 L. Ed. 2d 90, 91 S. Ct. 1586.

Lower courts have not interpreted the above decisions of this Court as requiring a request for a hearing as a condition precedent to the right to a hearing under the Fourteenth Amendment. See: *Pack v. Deitz, Commissioner* (Kentucky Court of Appeals) 455 S. W. 2d 575; *Lage* v. *Downing,* (U.S.D.C. So. Dist. Iowa) 314 F. Supp. 904; *Merriwether* v. *Burson* (U.S.D.C. No. Dist. Georgia) 325 F. Supp. 709, affirmed 439 F. 2d 1092; *Mott* v. *Betit* (U.S.D.C. Dist. of Vermont) Civil Action No. 6100, all holding that an evidentiary pre-termination hearing is required before discontinuance of welfare benefits. *Wright* v. *Finch, Secy.,* (U.S.D.C. Dist. of Columbia) 321 F. Supp. 383, holding an evidentiary pre-termination hearing is required before discontinuance of social security benefits. *Crowe* v. *California Department of Human Resources,* (U.S.D.C. No. Dist. California) 325 F. Supp. 1314, holding that termination of unemployment compensation requires a prior evidentiary hearing. *Holt* v. *Brown* (U.S.D.C. West'n Dist. Kentucky) 336 F. Supp. 2; *Santiago* v. *McElroy* (U.S.D.C. East'n Dist. Pennsylvania) 319 F. Supp. 284, and *Hall* v. *Garson* (5th Cir.) 430 F. 2d 430, all holding invalid state distress for rent statutes that did not provide for pre-seizure evidentiary hearings. *Laprease* v. *Raymours Furniture Co.,* (U.S.D.C. No. Dist. N.Y.), 315 F. Supp. 716, holding invalid a state replevin statute that did not provide for a pre-

seizure evidentiary hearing. Numerous other decisions of lower federal and state courts have failed to interpret the Supreme Court decisions cited above as making a request for a hearing a condition precedent to the right to a hearing. The opinion and judgment of the United States Court of Appeals for the Sixth Circuit, which petitioner seeks to have reviewed by this Court, is unique in that it appears to be the only decision making a request for a hearing a condition precedent to the right thereto.

Respondent's brief (page 5) states that a request for a pre-termination hearing is required by regulations adopted by the U. S. Department of Health, Education and Welfare. It is of course axiomatic that neither statutory enactments nor administrative regulations thereunder can over-ride constitutional guarantees of due process of law.

4. Due Process Includes Judicial Review

Respondent's brief (pages 6-7) states that if welfare recipients are continued on the welfare rolls pending judicial appeal, virtually every case of termination of welfare benefits would ultimately be appealed to this Court. That is not true.

The right to judicial review is an indispensable concomitant to the right to an administrative hearing. Especially where, as in the Kentucky welfare hierarchy, hearing officers are not impartial, legally-trained referees, and frequently have their decisions summarily overruled and reversed by the administrative head of the agency. Welfare benefits terminated in the ad-

ministrative process should be continued during the time that the recipient has in which to seek at least one judicial review and also during the time that such an appeal to the appropriate court is pending.

As said by this Court in the *Goldberg* case, the need to protect the public's tax revenues must be balanced against the individual's overpowering need not to be wrongfully deprived of assistance, and weighed in favor of the destitute welfare recipient whose brutal need for survival outweighs governmental fiscal aspects. "The stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment to great." *Goldberg* v. *Kelly,* 397 U. S. 261, 265, 266; 90 S. Ct. 1017, 1019.

CONCLUSION

For the reasons set out herein and in the petition for a writ of certiorari, there should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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